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No. 84-665

In the Supreme Court of the United States

October Term, 1984

J. A. MASSARO, WILLIAM S. KELTON, FRANCIS SISCO, JAMES A. POGNO, HENRY A. GUGGI, EDWARD R. KLEMENTS, CHARLES E. FARRELL and RICHARD W. HESS, individually and as representatives of engineers similarly situated,

Petitioners,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, NEW JERSEY TRANSIT RAIL OPERATIONS, and J. P. CARBERRY,

Respondents.

ON WRIT OF CERTIORARI TO THE SPECIAL COURT UNDER THE REGIONAL RAIL REORGANIZATION ACT OF 1973

BRIEF OF RESPONDENTS BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND J. P. CARBERRY IN OPPOSITION

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QUESTION PRESENTED

Whether the Special Court correctly held that the neutral referee's award providing for an order selection list seniority system, which award was entered pursuant to Section 508 of the Rail Passenger Service Act of 1973, as amended by the Northeast Rail Service Act of 1981, 45 U.S.C. §588, could not be set aside upon any of the grounds for limited review specified in that statute.

PARTIES INVOLVED

Respondent Brotherhood of Locomotive Engineers (BLE) is the bargaining representative for the craft of locomotive engineers employed by respondent New Jersey Transit Rail Operations (NJTRO), and respondent Carberry is an officer of BLE. Petitioners are locomotive engineers employed by NJTRO.

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OPINIONS BELOW

The opinion of the Special Court under the Regional Rail Reorganization Act is not reported as yet, and is printed in Appendix A to the petition, pp. 1a-12a.

OBJECTION TO JURISDICTION

The judgment of the Special Court under the Regional Rail Reorganization Act of 1973 is dated July 30, 1984 and was filed on August 8, 1984. Judgments of the Special Court are reviewable upon petition for a writ of certiorari as set forth in 45 U.S.C. §1105(b), which states in part:

> "A judgment of the special court in any action referred to in this section shall be reviewable only upon petition for a writ of certiorari to the Supreme Court of the United States . . . . Such review is exclusive and any petition or appeal shall be filed not more than 20 days after entry of such order or judgment."

The petition was filed on October 22, 1984, or more than 20 days after the judgment below was entered. The timely application for certiorari is jurisdictional. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923). It has long been held that a petition for a writ of certiorari should be dismissed if not taken within the time prescribed. *Whitsitt v. Union Depot and Rail Co.*, 122 U.S. 363 (1887). Accordingly, the petition should be dismissed.

STATEMENT

Petitioners were employed as engineers by Consolidated Rail Corporation (Conrail) and continue to hold flowback rights and seniority with that railroad. On January 1, 1983, certain commuter operations previously performed by Conrail in the State of New Jersey were assumed by respondent NJTRO pursuant to Section 506 of the Rail Passenger Service Act (RPSA), as amended by the Northeast Rail Service Act of 1981 (NERSA), 45 U.S.C. §556.

Petitioners began employment as engineers with NJTRO on that date and have continued to work in that capacity for that respondent.

Respondents BLE and NJTRO were unable to negotiate by August 1, 1982, an implementing agreement for engineers to be transferred from Conrail to NJTRO as provided in the 1981 statutory scheme, and a §508 neutral referee was appointed to engage in the interest arbitration prescribed by the statute. The arbitrator retained the right to confer ex parte with the representatives of BLE and NJTRO and to be available for clarification. The arbitrator developed a two-tier process to determine the Conrail engineers transferring to NJTRO and the seniority method to be used after the transfer had occurred. The transfer was to be accomplished by an order selection list or equity allocation list developed by inserting the names of employees based on their level of seniority with their respective seniority district on Conrail into the slots awarded their district by reason of the work equity or contribution of that district to the new operation on NJTRO. Once transferred, seniority was to be determined on the employees' retained date of hire with Conrail or any of its predecessors.

Due to a conflict in the award, BLE sought clarification. NJTRO agreed to a one-tier scheme or to change the seniority system to be used after the transfer from a date of hire roster to the order of selection list used upon the transfer. The neutral ratified the change on December 14, 1982. Section 510 of RSPA also required a single bargaining agreement. On December 30, 1982, respondents signed the §510 collective bargaining agreement which incorporated the order selection list seniority system.

When some of the petitioners complained to BLE's president about the change, he requested the neutral to re-

convene the §508 proceeding in order to formally hear and render reconsideration in a more traditional form. By order of the National Mediation Board, the referee did reconvene the proceedings and conducted a full hearing. Subsequently, the neutral issued his findings upon reconsideration and concluded that no basis had been established to justify a change in the order selection list system agreed to by the parties and confirmed in the December 14, 1982 award.

The Special Court refused to substitute its judgment for that of the referee in the §508 award and dismissed the petition to review on the ground that petitioners had not met the requisite burden in having a referee's award set aside.

REASONS FOR DENYING THE WRIT

This case does not involve any new or important question of law. As in the case of all railway labor arbitration, the decision on the merits by the §508 arbitration is final and binding on the parties, and review of a §508 award is based upon the same standards contained in Section 3, First (q) of the Railway Labor Act, 45 U.S.C. §153, First (q). The Special Court held that review of a neutral arbitrator's award under §508 arbitration is quite limited and that petitioners had an extreme burden in setting aside the award. Based upon the arbitrator's findings and the court's independent assessment of the record, the Special Court decided that the arbitrator had not failed to comply with the statute's requirements or acted corruptly or beyond his jurisdiction simply because he provided a seniority system different from the one advocated by petitioners. Further, the Special Court held that the respondent collective bargaining agents had the right under §510 of the

Rail Passenger Service Act of 1973, as amended by the Northeast Rail Service Act, 45 U.S.C. §590, to adopt and codify that seniority system in the negotiated collective bargaining agreement. Clearly, the decision below does not raise any question that deserves review by this Court.

Contrary to the sole ground for review contained in the petition, the decision of the Special Court is not a departure from the decision of this Court in *Firefighters Local Union No. 1784 v. Stotts,* ..... U.S. ....., 104 S. Ct. ....., 81 L. Ed. 2d 483 (1984), which case in any event is inapplicable to the matter at bar. In fact, the decision below is consistent with the prior holdings of this Court and is not in conflict with any decision of the other courts.

In exercising the original and exclusive jurisdiction given it by Section 1152(a) of the Northeast Rail Service Act, 45 U.S.C. §1105, over actions involving Section 508 of the Rail Passenger Service Act, the Special Court, in this case as in all previous cases of this kind before it, has stated the applicable test upon review in the following terms:

> "The Court has held that judicial review of a neutral referee's award under §508 is extremely limited and that petitioner must meet a heavy burden before it can succeed in having a referee's award set aside. NJT v. IBB, 550 F. Supp. at 1329. Section 508(d)(3) provides that such an award is to be 'final and binding to the same extent as an award of an adjustment board under §3 of the Railway Labor Act'. Judicial review under that section is limited to consideration of whether the arbitrator failed to comply with the statute's requirements, failed to act within his jurisdiction or acted corruptly. [UTU v. SEPTA, 555 F. Supp. at 1387 (citing authorities).]" Pet. App. A, 8a.

In referring to the permissible review provided by Section 3 of the Railway Labor Act, which was incorporated as the standard for review of Section 508 awards, this Court in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320, 325 (1972), said in terms dispositive of this case:

> "A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. Union Pacific R. Co. v. Price, 360 U.S. 601, 3 L Ed 2d 1460, 79 S. Ct. 1351 (1959). He is limited to the judicial review of the Board's proceedings that the Act itself provides. Gunther v. San Diego & A. E. R. Co. 382 U.S. 257, 15 L Ed 2d 308, 86 S. Ct. 368 (1975)."

This Court once again in *Union Pacific R. Co. v. Sheehan*, 439 U.S. 89, 90 (1970), emphasized that "the scope of review of Adjustment Board decisions is 'among the narrowest known to the law.' " Stressing the need for an allegedly aggrieved party to meet the grounds for review prescribed by the statute, the Court said:

> ". . . [T]he dispositive question is whether the party's objections to the Adjustment Board's decision fall within any of the three limited categories of review provided for in the Railway Labor Act. Section 153 First (q) unequivocally states that the 'findings and order of the (Adjustment Board) shall be conclusive on the parties; and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says. See, e.g. Gunther v. San Diego & A. E. R. Co., 382 U.S. 257, 263, (1965); Locomotive Engineers v. Louisville & Nashville R. Co., 373 U.S., *supra*, at 38; Union Pacific R. Co. v. Price, 360 U.S. 601, 616 (1959)." *Id.*, at 93-94.

There is no doubt that the Special Court applied a correct standard in reviewing the §508 award.

Petitioners' claim that the Special Court's decision conflicts with the recent decision of this Court in *Firefighters Local Union No. 1784 v. Stotts*, ... U.S. ....., 104 S. Ct. ....., 81 L. Ed. 2d 483 (1984), is also unavailing. This is not a race case, and does not involve a reading of Title VII of the Civil Rights Act of 1964. In *Stotts*, the issue was whether the district court exceeded its powers in entering an injunction requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority. 81 L. Ed. 2d at 495. By reason of that modification to the prior decree entered by the district court, the city was prevented from applying its seniority system in the manner it chose and the involved individuals lost competitive seniority. *Id.*, at 494 and 495, n.6. Here, petitioners would seek to devise a seniority system to deprive a minority group of employees of their competitive standings and also to set aside the arbitrator's award in order to prevent the state's rail commuter subsidiary and the bargaining representative of its employees from applying the seniority system in the manner chosen.

In this last respect, subsequent to the issuance of the §508 award, BLE and NJTRO entered into the collective bargaining agreement required by Section 510 of the RPSA, and incorporated the seniority provisions of the award upheld in the decision below. As the Special Court previously had held, "the creation of a seniority system for NJT employees is a proper subject of a collective bargaining agreement reached through the §510 process." *United Transportation Union v. Southeastern Pennsylvania*

Transp. Co., 555 F. Supp. 1382, 1389 (Sp. Ct. R.R.R.A. 1983), *cert. denied*, 104 S. Ct 96 (1983).

In fact, the seniority system adopted in the §508 award and bargained upon by the collective bargaining parties is not a novel one and has been upheld on numerous occasions by the courts . *See, e.g., Freeman v. Grand Int'l Broth. of Loc. Engineers*, 375 F. Supp. 81 (S.D. Ga. 1973), *aff'd*, 493 F.2d 628 (5th Cir. 1974); *Price v. Seaboard Coast Line R. Co.*, 332 F. Supp. 1093 (S.D. Ala. 1970), *aff'd*, 449 F.2d 1371 (5th Cir. 1971); *Smith v. Baltimore & Ohio R. Co.*, 485 F. Supp. 1026 (D. Md. 1980). It also has been used on Conrail. Thus, all this case involves is an attempt by petitioners to obtain seniority standing at the expense of the competitive seniority of others, which result would conflict with the rationale expressed in *Stotts*.

In sum, the language of the Special Court shows that petitioners' imagined harm does not accurately describe the award of the arbitrator or the holding of the court:

> "As Referee Kasher observed the fact that some members of petitioners' craft of engineers are dissatisfied with the order selection list method 'is not surprising, and, in fact, is not to be unexpected in any proceeding where employees with seniority rights on one property are transferred to another property where those seniority rights may undergo change or modification.' However, '[t]his court may not substitute its judgment for that of the referee' and petitioners' dissatisfaction does not alter this court's role in reviewing the neutral referee's award pursuant to §508. Based on the foregoing, it cannot be said that Kasher failed to comply with the statute's requirements or acted corruptly or beyond his jurisdiction simply because he amended the award to provide

for a seniority system different from the one advocated by petitioners." (Pet. App. A. 11a-12a).

Neither petitioners' dissatisfaction, nor this determination raises any issue which warrants review by this Court, and this case does not involve a situation meriting this Court's attention.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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